Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,

In The
Supreme Court Of The United States

OCTOBER TERM, 1982

NO. 82-641

RALPH POMPANO,
Petitioner

v.

MICHAEL SCHIAVONE & SONS, INC., and
REVISED PENSION PLAN OF
MICHAEL SCHIAVONE & SONS, INC.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Shaun S. Sullivan
WIGGIN & DANA
195 Church Street
P. O. Box 1832
New Haven, CT 06508
(203) 789-1511

Attorneys for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT . . . 5

I. The Decisions Below Neither Conflict With Decisions Of This Court Nor Create A Conflict Among The Circuits . 5

II. The Petition Does Not Present Issues of National Importance 13

III. The Decisions Below Are Consistent With The Language and Spirit of ERISA 17

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Dick v. New York Life Insurance Company, 359 U.S. 437 (1959) . . 6

Keller v. Adams-Campbell Co., 264 U.S. 314 (1924) 8

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) . . . 8

Magnum Co. v. Coty, 262 U.S. 159 (1923) 6

Sanchez v. Borras, 283 U.S. 798 (1931) 9

Wisconsin Electric Co. v. Dunmore Co., 283 U.S. 798 (1931) 8-9

STATUTES:

29 U.S.C. § 1022(b) 16, 18

29 U.S.C. § 1132(a) 11, 23

29 U.S.C. § 1133 . . . . . 16, 21

LEGISLATIVE REPORTS:

H.R.Rep. No. 93-533, 93d Cong., 1st Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4639 16

H.R. Rep. No. 93-1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5038 22

OTHER AUTHORITIES:

Supreme Court Rule 17 6-7

Stern and Gressman, Supreme Court Practice, (5th Ed. 1978) . . . 6, 8, 10, 14

STATEMENT OF THE CASE

Ralph Pompano, a retired employee of Michael Schiavone & Sons, Inc. ("Schiavone"), brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA") against Schiavone and the Revised Pension Plan of Michael Schiavone & Sons, Inc. of 1972 ("Plan"), in an effort to require the Pension Committee to award him a lump sum payment in lieu of the normal monthly retirement benefit provided by the Plan. Each month since his retirement, Mr. Pompano has received a monthly pension payment in the amount of $296.83, which is the actuarial equivalent of the lump sum pension payment he sought. (App. p. 3A).*

---

*Parenthetical references are to the Appendix to the Petition.

The standard method of payment under the Plan was a monthly retirement payment continuing for the life of the participant. (App. p. 21A). Three alternative methods of payment, one of which was the lump sum option, also were provided for in the Plan. As the plan summary explicitly stated, these alternative modes of payment were available "only with the permission of the Committee." (App. p. 3A).

In the exercise of the discretion given it under the Plan, the Pension Committee denied Mr. Pompano's request for a lump sum payment. This decision was based in large part on advice given the Pension Committee by Pension Services, Inc., the Plan's pension consultant, which had advised against making large lump sum payments for three principal reasons: first, Plan assets might have to be sold in order to make

large lump sum payments; second, free availability of the lump sum option would complicate long-term investment strategy by forcing the Plan to retain funds in more liquid assets; and third, such payments would tend to invalidate long term overall mortality assumptions because a self-selected group of participants with a shorter life expectancy would elect the lump sum option. (App. pp. 6A, 24A). Furthermore, as the Court of Appeals noted, approval of the lump sum request made by Mr. Pompano would have been inconsistent with Schiavone's philosophy of providing a continuing source of income to its retiring employees. (App. p. 6A).

The decision made by the Pension Committee in the present case was consistent with the treatment given to other retiring employees. The evidence

showed that large lump sum payments had been refused to Schiavone executives, and that the Pension Committee had only granted lump sum requests where the payments were less than $3,000.(App. p. 25A).* On such occasions the Pension Committee had concluded that such modest payments did not constitute a drain on the Plan's assets and would not have met the Plan's primary purpose of providing participants with a monthly income sufficient for retirement. (App. 6A).

There is no claim that the petitioner has been denied his pension benefits under the Plan, nor is there any claim that petitioner was treated differently than any similarly situated

---

*Petitioner's lump sum payment would have been $38,172. (App. 6A).

Plan participant. This controversy concerns only the petitioner's desire to obtain a lump sum payment instead of the normal monthly retirement benefit.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW NEITHER CONFLICT WITH DECISIONS OF THIS COURT NOR CREATE A CONFLICT AMONG THE CIRCUITS

It is axiomatic that a petition for certiorari will not be granted merely on a showing that the decision of the court below was incorrect:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitfoner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.' . . . If we took every case in which

> an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.
>
> Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi, reprinted in Stern and Gressman, Supreme Court Practice, at pp. 258-59 (5th ed. 1978).

In the same vein, Chief Justice Taft observed:

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.
>
> Magnum Co. v. Coty, 262 U.S. 159, 163 (1923).

See also Dick v. New York Life Insurance Company, 359 U.S. 437, 452-55 (1959) (Frankfurter, J., dissenting). These sentiments have now been codified in Rule 17 of the Supreme Court Rules, which stipulates that a review on writ

of certiorari "is not a matter of right," and will be granted "only where there are special and important reasons therefor."

In addition to re-arguing the merits, the present petitioner has urged two reasons for granting the writ. He claims that the decisions below are inconsistent with decisions of this Court, and he asserts that the decisions below create a conflict among the circuit courts as to ERISA's interpretation. Neither of these claims is supported by the cases cited in the petition.

I

Where a petition for certiorari is sought on the ground of conflict between the circuits or between the lower court opinion and an opinion of the Supreme Court, the petitioner must demonstrate that there is a "real conflict on the

same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Stern and Gressman, Supreme Court Practice, op cit. at 264. Where the alleged conflict is not a true conflict on precisely the same question, the petition for certiorari is "but one way of saying that the decision below is wrong in light of general principles." Id. at 265. This is not a sufficient reason for granting the writ. Indeed, the Court will dismiss a writ of certiorari as improvidently granted where subsequent examination reveals that the alleged conflict did not in fact exist. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 392-93 (1923); Keller v. Adams-Campbell Co., 264 U.S. 314, 319-20 (1924); Wisconsin Electric Co. v. Dunmore

Co., 282 U.S. 813, 813 (1931); Sanchez v. Borras, 283 U.S. 798, 799 (1931).

Even a cursory review of the cases cited by the petitioner in support of his argument that the decisions of the courts below are in conflict with decisions of this Court demonstrate the absence of any conflict. Not only are the cases cited at page 6 of the petition not directly in conflict with the decisions below, they do not even involve the same statute. Three of the Supreme Court cases cited concern the securities laws, while the fourth is a case under the Truth-in-Lending Act.

To warrant the issuance of a writ of certiorari, the claimed conflict must be a direct one:

> Lawyers, of course, are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what

> makes the ruling below "erroneous." But such a loose reading of the [Rule 17] concept of a decision "in conflict with applicable decisions of this court" does not satisfy the Supreme Court's understanding of what constitutes a conflict, and will not be sufficient to obtain a grant of certiorari. A true conflict, in other words, must be direct and irreconcilable, and must be demonstrably so.
>
> Stern and Gresser, op cit. at p. 273. (emphasis supplied).

This requirement of a direct conflict has become even more stringent under the present Supreme Court Rules. While the former Rule 38(5)(b) required only a showing that the decision of the Court of Appeals was "probably" in conflict with a Supreme Court opinion, the present Rule 17.1(c) has eliminated the word "probably." It is evident from the cases cited in his petition that petitioner has failed to meet this exacting standard.

II

Petitioner asserts that the opinions below also create a conflict among the circuits as to the scope of 29 U.S.C. § 1132(a). In support of this claimed conflict, petitioner cites, at page 10 of his petition, several cases which hold that ERISA permits pension plan participants to bring suit to enjoin present and threatened future violations of a pension plan.

The decision of the courts below in the present case are entirely consistent with this position. Thus, the Court of Appeals agreed that § 1132(a) authorized pension plan participants to institute suit under ERISA to enforce the provisions of the pension plan, and the trial court noted that petitioner might have obtained an injunction if there were evidence that the Plan violation alleged -- failure to keep minutes of

Pension Committee meetings -- was a continuing one. (App. pp. 9A, 10A, 33A).

However, the failure to keep minutes was not deemed sufficient to grant petitioner the relief he sought, because it was not causally related to the Pension Committee's decision to deny petitioner a lump sum form of payment. (App. pp. 9A-10A).

The present petitioner never sought an injunction directing the Pension Committee to keep minutes. Rather, he attempted to use the failure to keep minutes as a justification for requiring the Pension Committee to reverse its decision on the lump sum payment. None of the cases cited at page 10 of the petition holds or even suggests that a procedural irregularity, such as the failure to keep minutes of pension committee meetings, would justify a court order directing a particular

method of payment of a pension, where the pension committee's decision as to the method of payment was not in any way affected by the procedural irregularity.

Accordingly, the petitioner has failed to demonstrate any conflict, either among the circuits or between the opinion below and the decisions of this Court.

II. THE PETITION DOES NOT PRESENT ISSUES OF NATIONAL IMPORTANCE

Even if there were a "true" conflict in the present case, that does not guarantee that the Court will issue the writ:

> The Court as a whole now seems committed to giving the existence of a conflict less than decisive weight.
>
> * * *
>
> The important and recurring nature of the issue in conflict often plays a decisive role in the grant or denial of certiorari.

Stern and Gressman, op cit. at 269-70.

Thus, Chief Justice Vinson admonished:

> To remain effective the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.
>
> Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi, reprinted in Stern and Gressman, op cit. at 259. (emphasis supplied).

Petitioner has not even attempted to argue that the issues raised in the present case meet Chief Justice Vinson's test. In assessing the national significance of the present petition, it must be emphasized that this case is not concerned with a denial of pension benefits. The petitioner is concededly receiving a monthly retirement income, which is the actuarial equivalent of the

lump sum payment he would prefer. All that is involved is a dispute over the manner of payment of those benefits, and the courts below held that the Pension Committee did not abuse its discretion in refusing to deviate from the standard monthly payments. (App., pp. 7A, 28A).

That the manner of payment of pension benefits is not a matter of importance beyond the present parties is evidenced by the fact that, as the Court of Appeals pointed out, ERISA contains no provisions whatsoever dealing with the form and manner of payment of pension benefits. (App. p. 9A). That issue is left to the discretion of the pension plan's fiduciaries.

The thrust of the Act, as evidenced by its legislative history, is to prevent the unwitting forfeiture of pension benefits:

> Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets.
>
> H.R. Rep. No. 93-533, 93d Cong. 1st Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4646.

Accordingly, in setting forth the requirements of a plan summary, 29 U.S.C. § 1022(b) mandates only that the summary disclose the circumstances which may result in a "denial or loss of benefits." Similarly, 29 U.S.C. § 1133 requires written notice and an opportunity for review only where a "claim for benefits has been denied."

In short, the central focus of ERISA is to protect employees from engaging in actions which would cause a forfeiture

of benefits under the pension plan. Nothing in the language or purpose of the Act suggests that Congress had any concern over the particular manner of payment. This case, being limited to a dispute over the manner of payment, is therefore not one which will have "immediate importance far beyond the particular facts and parties' involved."

III. THE DECISIONS BELOW ARE CONSISTENT WITH THE LANGUAGE AND SPIRIT OF ERISA

Plaintiff raises three issues in his petition for certiorari. He argues first that the plan summary should have specified that the lump sum mode of payment would be granted only in instances where the total pension benefit was small. Second, he contends that he should have received written notice of the reasons for the Committee's decision not to grant a lump sum payment, as well as an opportunity

for review of that decision. Third, he asserts that the courts below erred in not awarding him judgment because of the defendants' failure to keep written records of its meetings. None of these arguments can withstand scrutiny.

I

The short answer to the claim that the plan summary should have informed plan participants that the lump sum payment was not available to long term employees is that that information is not required by the terms of the statute. The statute requires that the plan summary disclose the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," 29 U.S.C. § 1022(b)(emphasis added). ERISA does not require disclosure of detailed information concerning the manner of payment of pension benefits.

Furthermore, the record is clear that petitioner was not misled by the plan summary. The plan summary, in unambiguous language, informed participants, including petitioner, that the lump sum option was not available as a matter of right, but only in the Pension Committee's discretion:

> D. Lump Sum
>
> Under this option, you receive a lump sum equal to the value of your retirement benefit. This option is available only with the permission of the Committee.
>
> (App. p. 36A)
> (emphasis supplied).

Thus, even if ERISA's summary plan description requirements encompassed the mode of payment -- and they do not -- the present description was sufficient on its face. Indeed, the trial judge made a specific finding that petitioner was not misled by the plan summary, and

this finding was affirmed by the Court of Appeals. (App. pp. 29A, 7A-8A).

Finally, as the Court of Appeals observed, requiring the Pension Committee to enumerate in the summary all the factors to be considered by the Pension Committee in making its determination as to lump sum payments would defeat the very purpose of the summary -- i.e., a brief synopsis of the plan -- and would undercut the flexibility essential to effective financial management which Congress intended to vest in pension plan fiduciaries. (App. pp. 5A, 6A).

II

As to the claim that the petitioner did not receive written notice of the Committee's decision regarding the lump sum or an opportunity for a review of that decision, the very language of the statute itself makes it apparent that

written notice and an opportunity for review are required only where a "claim for benefits" has been denied. Thus 29 U.S.C. § 1133 provides that the plan shall:

> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.
>
> (emphasis supplied).

There has been no denial of a "claim for benefits" in the present case; indeed the plaintiff has received, and continues to receive, retirement benefits each month since his retirement. The only dispute is over the particular method of payment.

The legislative history of § 1133 confirm that ERISA's procedural safeguards were intended to come into play only where there has been a denial of a "claim for benefits." That section was included as a compromise between the House Bill, which contained no procedures for resolving disputes between the plan administrator and participants, and the Senate version, which provided for review and arbitration of all disputes. The final compromise version imposed the procedural requirements only where there has been a denial of a "claim for benefits." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5038, 5108.

The petitioner has failed to cite a single case or statutory section which supports his contention that the Committee's discretionary refusal to

grant a lump sum payment was a "denial of benefits" which would trigger the procedural requirements of §1133.

III

The petitioner's final claim is that the Pension Committee violated the Plan's requirements by failing to keep minutes of its meetings. It is important to note that these requirements are not mandated by federal law, but are merely provisions in the Plan itself. ERISA permits a plan participant to bring an action to enforce the provisions of the Plan. 29 U.S.C. § 1132(a)(3). Therefore, it is possible that a participant in the Plan sub judice may have had a right of action to seek an injunction requiring that the Pension Committee keep minutes. Thus, the District Court noted that petitioner might have arguably obtained an injunction if there were any

evidence of a present violation, but there was no evidence of any present violation. (App. p. 33A).

The only appropriate relief for the failure to keep minutes would be an order requiring that that be done. However, petitioner has never requested such relief. Instead, petitioner attempts to use the failure to keep minutes as a justification for overturning the Pension Committee's decision to deny a lump sum benefit. The fundamental flaw in this attempt is that the petitioner has not been damaged by the failure to keep minutes. The only possible value of written minutes is to provide petitioner with a summary of the Pension Committee's actions. In numerous oral communications between Mr. Pompano and the Pension Committee members, Mr. Pompano was fully informed of the Committee's decision on his

request for a lump sum payment and the reasons therefor. (App. p. 10A). Consequently, there can be no dispute that Mr. Pompano did not suffer any prejudice as a result of the failure to keep written minutes.

Finally, the most telling refutation of petitioner's contention that the failure to keep minutes can be used to secure for petitioner that which he could not have obtained if minutes had been kept, i.e., a lump sum retirement payment in contravention of the Pension Committee's decision, is petitioner's inability to cite a single case in support of this argument.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

By_____
Shaun S. Sullivan
of Wiggin & Dana
195 Church Street
P. O. Box 1832
New Haven, CT 06508
(203) 789-1511

Dated: November 5, 1982